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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 660

A. N. SPANEL,

Petitioner,

vs.

DR. BORIS BERKMAN AND DR. SOPHIA BERKMAN,

Respondents.

BRIEF OF RESPONDENTS IN ANSWER TO PETITION FOR WRIT OF CERTIORARI.

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SUBJECT INDEX.

	PAGE
Opinion below	1
Statement of the case	1
Summary of the argument	5
Argument	6
Conclusion	16
Appendix	17

TABLE OF CASES CITED AND AUTHORITIES CITED.

Albright v. Oyster, 60 Fed. 644 (8th C. C. A.)	9
Allen v. Bank of Angelica, 34 Fed. (2d) 658, 659 (2nd C. C. A.)	9
Altman v. Shopping Center, 82 Fed. (2d) 521, 526 (8th C. C. A.)	9
Arkadelphia Milling Co. v. St. Louis S. W. Ry. Co., 249 U. S. 134	11
Bates v. Dresser, 251 U. S. 524, 532	16
Boylan v. Boylan, 349 Ill. 471, 473	14
Charm (The), 59 Fed. 476	16
Chase v. Driver, 92 Fed. 780, 786 (8th C. C. A.)	9
Colquette v. Crossett Lumber Co., 149 Fed. (2d) 116, 118 (8th C. C. A.)	9
Credit Bureau of San Diego, Inc. v. Petrasich, 118 Fed. (2d) 470, 471 (9th C. C. A.)	9
Crowshay v. Soutter, 73 U. S. (6 Wall.) 739	9
Denney (In Re), 135 Fed. (2d) 184, 186 (7th C. C. A.) Cert. den. 64 S. Ct. 50, 320 U. S. 747, rehearing den. 64 S. Ct. 155, 320 U. S. 812	9

Embry v. Palmer, 107 U. S. 3, 8 9
Erie Railroad Co. v. Tompkins, 304 U. S. 64 .....5, 13
Erwin v. Lowry, 48 U. S. (7 How.) 172 (1849) 10
Fidelity Union Title & Mortgage Guaranty Co. (In Re), 137 N. J. Eq. 193 14
Gilfillan v. McKee, 159 U. S. 303, 311 9
Guaranty Trust Co. v. York, 326 U. S. 99, 108, 109 13
Hawkins v. Barney Lessee, 5 Pet. 457, 464 15
Holt v. Rees, 46 Ill. 181, 183 14
Jones v. Pettingill, 245 Fed. 269 12
Kaiser v. Standard Oil Co. of N. J., 89 Fed. (2d) 58, 59 (5th C. C. A.) 9
King v. Order of United Commercial Travelers of America, 333 U. S. 153, 157 13
Kraus v. Kraus, 74 N. J. Eq. 417 14
McGowan v. London and Lancashire Indemnity Company of America, 237 Ill. App. 561, 569, 570 16
Meriam v. Haas, 70 U. S. (3 Wall.) 687 .....10, 11
Minot Auto Co. (In Re), 298 Fed. 853, 857 (8th C. C. A.) 9
Morgan v. Ladd (1845), 7 Ill. (2 Gilm.) 415 14
Northwestern Fuel Co. v. Brock, 139 U. S. 216 11
Oriole Phonograph Co. v. Kansas City Fabric Products Co., 34 Fed. (2d) 400, 401 (8th C. C. A.) 9
Peoples v. Lee, 286 Ill. App. 1..... 14
Scott v. Scott, 304 Ill. 267, 272 14
Smith v. Morris, 69 F. (2d) 3, 5 (3rd C. C. A.) 9
Spanel v. Berkman, 171 F. (2d) 513 (7th C. C. A.) 6
Spencer v. Babylon R. Co., 250 Fed. 24 (2nd C. C. A.) 9
United States v. Benedict, 261 U. S. 294, 298 9

United States v. Dashiel, 70 U. S. (3 Wall.) 688 11
Woodworth v. Chesbrough, 244 U. S. 79, 82 9

STATUTES CITED.

28 U. S. C. 400 5
28 U. S. C. 1961 .....5, 16
Rule 62(d) Rules of Civil Procedure 5, 15

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Respondents.

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OPINION BELOW.

The opinion of the District Court is not officially reported. It appears at pages 391-393 of the record. The opinion of the Court of Appeals is reported in 171 F. (2d) 513, and is set forth at pages 442-45 of the record.

STATEMENT OF THE CASE.

Petitioner's statement of the case is misleading and incomplete. A mere statement of the facts will demonstrate that no important federal question is involved.

Petitioner, A. N. Spanel, filed a complaint in the District Court of the United States for the Northern District

of Illinois against respondents, Dr. Boris Berkman, and his sister, Dr. Sophia Berkman, for a declaratory judgment under Section 274(d) of the Judicial Code, 28 U. S. C. A. § 400. Jurisdiction was based upon diversity of citizenship of the parties and the requisite jurisdictional amount (R. 2).

In his complaint petitioner alleged that on April 5, 1945, he entered into a written contract with the respondents and prayed for a declaration by the Court that this contract was in full force and effect and not terminated (R. 2-4). In their answer respondents alleged that they had performed their contract with petitioner and denied that it was in full force and effect (R. 21).

The contract is set forth at pages 254-265 of the record. Its terms and provisions are succinctly stated in the opinion of the Court of Appeals (R. 442-445).

The District Court made extensive findings of fact, and in its judgment declared and fixed the rights of the parties. In its judgment, which was supported by adequate findings and conclusions of law (R. 393-401), the District Court declared:

> "(4) That the agreement between the plaintiff and the defendants, dated April 5, 1945, was duly determined and terminated on February 16, 1947, in accordance with the provisions of Paragraph 8 of Article II of said agreement, by reason of plaintiff's failure to give notice in writing to either of the defendants of his election to perform or go forward with the terms of Article III of said agreement, and the rights of the plaintiff under said agreement ceased and determined on February 16, 1947, and none of the parties hereto have any claims or obligations to any of the other parties under the terms of said agreement, except as hereinafter stated.
>
> "(5) That the pilot plant * * * materials, equipment * * * are the property of the plaintiff.

"(6) That plaintiff is entitled to the sum of $973.98 remaining unexpended out of the sum of $25,000 furnished by plaintiff to defendants, as provided in said contract, and that plaintiff do have and recover of and from defendants the sum of $973.98." (R. 401-02.)

The sum of $973.98 was awarded to petitioner not because it was inadequate to carry on further research, as implied at page 4 of petitioner's statement of the matters involved, but because the contract between the parties had terminated (R. 400-402).

The judgment of the District Court was entered on October 15, 1947 (R. 402). Consistently with this judgment petitioner took possession of, dismantled and removed the pilot plant. On November 6, 1947, petitioner voluntarily accepted from respondents the payment of the judgment awarded him in the amount of $973.98 and on the same day his attorneys filed a satisfaction of that judgment with the Clerk of the District Court (R. 403). Thereafter, on November 12, 1947, petitioner filed his notice of appeal (R. 404).

Neither party appealed from the judgment awarding to petitioner the sum of $973.98. Petitioner appealed from that portion of the judgment declaring the agreement of the parties terminated and denying him the relief prayed for in his complaint (R. 405). Respondents filed a cross-appeal from that portion of the judgment of the District Court awarding the pilot plant to petitioner (R. 412).

Afterward, on February 16, 1948, respondents filed a motion to dismiss petitioner's appeal (R. 423). This motion was denied by the Court of Appeals on March 2, 1948 without prejudice to respondents' right to renew the motion at the hearing of the cause on its merits (R. 429). Subsequently, on December 20, 1948, the Court of Appeals dismissed petitioner's appeal in Cause No.

9534 and in Cause No. 9535 affirmed the judgment of the District Court awarding the pilot plant and equipment to petitioner (R. 442-51). Respondents have sought no review of the decision of the Court of Appeals awarding the pilot plant and equipment to petitioner.

SUMMARY OF THE ARGUMENT.

I.

Petitioner's acceptance of the benefits of the judgment upon the theory that the contract was terminated precluded him from claiming in the Court of Appeals that the contract was still in force. A litigant cannot avail himself of the advantages of a judgment and then question its disadvantages in a court of review. This rule is applied uniformly in every court, federal and state, and does not conflict with any decision of this court.

II.

The essence of diversity jurisdiction is that the federal courts enforce State law, and that was done in this case. By urging this court to adopt a rule in conflict with the Illinois decisions, the petitioner is seeking a reversal of the policy established by this court in *Erie* v. *Tompkins,* 304 U. S. 64.

III.

Rule 62(d) of the Federal Rules of Civil Procedure relating to stays of execution has no relevance to the present case as no stay of execution was here applied for or granted. Petitioner voluntarily accepted full payment of the judgment awarded to him in the amount of $973.98 and satisfied it (R. 403). His argument upon this point is hypothetical and wholly inapplicable.

Nor does 28 U. S. C. 1961, relating to interest on judgments, have any relevance here. The petitioner collected his judgment and is not entitled to interest. It is the settled rule that a party who appeals from a judgment in his favor is not entitled to interest until the appeal is disposed of in a court of review.

ARGUMENT.

I.

A Litigant Cannot Accept the Benefit of a Judgment and Then Seek Its Reversal in a Court of Review. This Rule Is Applied Uniformly and Constantly in Every Court and Does Not Conflict With Any Decision of This Court.

No rule is better settled than that applied by the Court of Appeals in this case. This was an action requiring a declaration of rights. The issue was simple. Petitioner contended that his contract with respondents was in full force and effect. Respondents contended that they had performed the contract and that the rights of petitioner thereunder had ceased.

The District Court declared the contract terminated and awarded to petitioner the unexpended money as well as the pilot plant and equipment. Petitioner's conduct in accepting the balance of the funds and the pilot plant is consistent only with the judgment declaring the contract terminated. This fact appears clearly from the opinion of the Court of Appeals, where it said (171 F. (2d) 513, 516. (R. 447-449)):

> "We are unable to discern how it can be contended with any degree of seriousness that the instant situation comes within either of the exceptions to the general rule. The money award in favor of the plaintiff was not independent and separable from the remainder of the judgment and neither was plaintiff entitled to such award in any event. The judgment on its face and the issues upon which plaintiff sought a declaration of rights plainly disclose that the money award was made and could have been made only as a con-

> dition subsequent to and depending upon the termination of the agreement. Plaintiff's receipt of that sum and satisfaction of the judgment in that respect is consistent only with the findings and judgment declaring the parties' agreement terminated. The obvious effect of a reversal of that portion of the judgment appealed from by the plaintiff would be to leave the contract in force. Presumably under such circumstances the defendants would be required to resume experimentation and research without the benefit of the balance of the funds which have by the judgment been awarded to the plaintiff and received by him."

Concededly petitioner had the right to accept or reject the benefits he obtained by the judgment of the District Court. He chose to accept these benefits. He obtained payment of the unexpended funds in the amount of $973.98 (R. 403). He took title to and possession of the pilot plant and equipment valued at the sum of $9,440.09 (R. 381-382). The benefits thus obtained by petitioner by virtue of the judgment of the District Court had a total value in cash and property of over $10,000.00.

Under the circumstances presented in this case what further or other declaration of rights could any court of review make? Petitioner has the balance of the funds and the pilot plant. Without these, respondents could not be required to perform their contract further. True, petitioner later offered to deposit the funds with the Clerk of the Court of Appeals. Presumably he will offer to deposit the pilot plant and equipment with the Clerk of this Court. Petitioner neglects, however, to explain how this Court or the Court of Appeals can obtain jurisdiction over these vital portions of the judgment which have become conclusive on the parties. Neither party appealed from the judgment awarding to petitioner the sum of $973.98. The Court of Appeals affirmed that portion of the judgment

of the District Court declaring that petitioner was entitled to the pilot plant and equipment (R. 449, 450) but neither petitioner nor respondents filed any petition for rehearing or writ of error to review that portion of the decision of the Court of Appeals.

The right to proceed on a judgment and enjoy its fruits and the right of appeal are not concurrent. Petitioner's election to take one course was a renunciation of the other. It would be manifestly unjust to permit petitioner to take the money and the pilot plant and at the same time to permit him to speculate upon the chance of obtaining a different judgment in a court of review. Under the theory advanced by petitioner he can have his cake and eat it too. He can contend that the contract is in effect and is also terminated. No such rights are given respondents. They devoted over a year and a half of their lives in the performance of this contract without any remuneration (R. 242, 380, 383). They have received offers from other institutions and persons to finance their invention but they are precluded from entering into other contracts for the exploitation of their product while petitioner continues to litigate (R. 249, 250).

This is not a case where alternative remedies are afforded a litigant. Either the contract was in force or it was terminated. Petitioner chose to take back his investment. He had no right to the money or to the pilot plant if the contract was still in effect. If petitioner's theory is correct then a litigant has the privilege of taking back the money and property he is required to furnish under a contract, and when his right to take such a position is questioned he may undo his wrong by merely offering to deposit with the clerk of the court the money and property. There is no risk attached to such a theory. If this theory were adopted it would behoove every litigant to grasp what he could get in a trial court upon any principle

of law and see if he could secure more in a court of review. Presumably under this theory the principles of estoppel by contract, by deed and by conduct would be abandoned while each litigant raced to a court of review with his offer to do equity provided he got more.

The rule applied by the Court of Appeals in this case is one of universal application. It has been a long established principle that a litigant "cannot hold what it accepted and demand more". See: *United States* v. *Benedict*, 261 U. S. 294, 298; *Woodworth* v. *Chesbrough*, 244 U. S. 79, 82; *Crowshay* v. *Soutter*, 73 U. S. (6 Wall.) 739. The rule, as well as its exceptions, was recognized by this Court in *Gilfillan* v. *McKee*, 159 U. S. 303, 311 and *Embry* v. *Palmer*, 107 U. S. 3, 8. Both of these last mentioned decisions were considered and distinguished by the Court of Appeals in its opinion (R. 446-448).

The argument that there is a conflict of decisions in the Courts of Appeals regarding the application of this rule is wholly without merit. The rule is well settled in the federal Courts of Appeal. *Albright* v. *Oyster*, 60 Fed. 644 (8th C. C. A.); *Chase* v. *Driver*, 92 Fed. 780, 786 (8th C. C. A.); *Spencer* v. *Babylon R. Co.*, 250 Fed. 24 (2nd C. C. A.); *In Re Minot Auto Co.*, 298 Fed. 853, 857 (8th C. C. A.); *Allen* v. *Bank of Angelica*, 34 F. (2d) 658, 659 (2nd C. C. A.); *Oriole Phonograph Co.* v. *Kansas City Fabric Prod. Co.*, 34 F. (2d) 400, 401 (8th C. C. A.); *Smith* v. *Morris*, 69 F. (2d) 3, 5 (3rd C. C. A.); *Altman* v. *Shopping Center*, 82 Fed. (2d) 521, 526 (8th C. C. A.); *Kaiser* v. *Standard Oil Co. of N. J.*, 89 F. (2d) 58, 59 (5th C. C. A.); *Credit Bureau of San Diego, Inc.* v. *Petrasich*, 118 F. (2d) 470, 471 (9th C. C. A.); *In Re Denney*, 135 F. (2d) 184, 186 (7th C. C. A.) Cert. den. 64 S. Ct. 50, 320 U. S. 747 rehearing den. 64 S. Ct. 155, 320 U. S. 812; *Colquette* v. *Crossett Lumber Co.*, 149 F. (2d) 116, 118 (8th C. C. A.).

In fact, no rule is better settled in American jurisprudence. We respectfully refer this Court to the decisions of State Courts set forth in the appendix. The cases there listed are not cited as authorities to support the rule, which indeed requires no such citation, but are given as illustrations of the universal way in which the rule is accepted and applied.

A review of the cases cited by the petitioner will show that they either are not in point or come within the exceptions to the rule.

The case most relied upon by petitioner is *Erwin* v. *Lowry*, 48 U. S. (7 How.) 172 (1849). In that case the Supreme Court of Louisiana held that plaintiff, Lowry, was entitled to the possession of certain slaves and real property but ordered that no writ issue to put him into possession until he paid the sheriff or the defendant, Erwin, the sum of $436.55. No money judgment was entered against Lowry. He paid this sum in order to make his judgment operative. Manifestly Lowry could not perform a condition imposed upon him before he could obtain the benefit of his own judgment and then contend that the performance of that condition precluded Erwin from questioning the judgment. As this Court stated Lowry could not "complain of his own voluntary acts." In effect all this Court decided in that case was that a defendant does not waive his right to appeal by paying a judgment entered against him. This is a common occurrence in case of an appeal without a *supersedeas*. Thus it will be seen that there is no similarity between the facts or principles involved in the Lowry case and the case under consideration. In our case there were no strings or conditions attached to the judgment entered in favor of petitioner. It was a plain money judgment. Petitioner here was not compelled to do anything.

The next case cited by petitioner is *Merriam* v. *Haas*,

70 U. S. (3 Wall) 687. The plaintiff in that case did not take any inconsistent position. He claimed the full amount due him on a mortgage. He was awarded less and appealed. A note to the case shows that upon reversal the plaintiff was awarded the full amount of the mortgage.

Petitioner also cites *United States* v. *Dashiel,* 70 U. S. (3 Wall) 688. In that case this Court held that a partial satisfaction of a money judgment would not operate as an extinguishment of the judgment. Whether the majority opinion in that case reached the correct conclusion might be debated, but that is not important, since the opinion contains a clear intimation, *obiter,* that if payment of the judgment had been "in full", the result would have been different (p. 702). The decision hence has no application here, since petitioner accepted payment in full of the money judgment which was awarded to him, and took possession of the pilot plant and equipment which were held by the District Court to belong to him, thus taking full advantage of the judgment, so far as it was in his favor.

The last two mentioned decisions may be distinguished further upon the ground that the plaintiffs in those cases were entitled to recover, in any event, the portion of the judgment awarded them. The petitioner here, as the Court of Appeals points out, was not entitled in any event to his judgment (R. 447).

Petitioner next cites cases holding that a wrongdoer will be required to make restitution where his adversary appeals and obtains a reversal of the judgment. There is hardly room for controversy as to this proposition. As this Court pointed out in *Northwestern Fuel Co.* v. *Brock,* 139 U. S. 216, cited by petitioner herein, the right of restitution has been recognized in the law of England and America from a very early period. Similarly in *Arkadelphia Milling Co.* v. *St. Louis S. W. Ry. Co.,* 249 U. S. 134, also cited by petitioner, this Court stated that where

"plaintiff had judgment and execution, it was regularly a part of the judgment of reversal" that the defendant be restored to all things he lost by reason of the judgment. However, in the case at bar the respondents are not asking for restitution. None of these decisions call for the application of the rule that a litigant who accepts the benefits of a judgment cannot question its disadvantages in a court of review.

Another case which petitioner relies upon as upholding his theory is *Jones* v. *Pettingill*, 245 Fed. 269. In that case plaintiffs sought an adjudication that they were entitled to a one-half interest in a plantation. The District Court decreed that plaintiffs were entitled to an interest in the property upon the payment to the defendant of a certain sum owed on a mortgage and for improvements. This decree required the defendant to file a receipt for this money with the registry of the court. Defendant, unlike the petitioner in the case at bar, did not acquiesce in the judgment. He filed a motion to set it aside. He filed a supersedeas bond. He did not acknowledge satisfaction of the judgment except as directed by the decree. It appears clearly from the decision that the defendant "mistakenly supposed himself under the necessity of receiving the money and filing the receipt therefor." The petitioner herein makes no such claim. He voluntarily filed a satisfaction of the judgment and he was not ordered to do so by the District Court (R. 403, 401).

II.

The Essence of Diversity Jurisdiction Is That the Federal Courts Enforce State Law and That Was Done in This Case.

The contract upon which petitioner sought a declaration of rights was executed and performed in the State of Illinois (R. 165, 211, 266). No federal question is involved. The case presents a dispute between private citizens regarding a private contract.

For purposes of diversity jurisdiction a federal court is "in effect, only another court of the State". It has been said that "in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State Court". *Guaranty Trust Co.* v. *York,* 326 U. S. 99, 108, 109; *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64.

The Constitution conferred jurisdiction on the federal courts in order to prevent apprehended discrimination against non-residents. Its purpose was not to give non-residents greater rights than a State would accord its own citizens. "So long as it does not impinge on federal interests, a state may shape its own law in any direction it sees fit and it is inadmissible that cases dependent on that law should be decided differently according to whether they are before federal or state courts". *King* v. *Order of United Commercial Travelers of America,* 333 U. S. 153, 157. Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in diversity cases is the law of the State. *Erie* v. *Tompkins,* 304 U. S. 64.

There would be no doubt regarding the outcome of this case if it had been presented to the Supreme Court of Illinois. It, in common with the rest of the States, has declared: "The rule of law is well established that a party to a decree cannot avail himself of those parts of the decree which are beneficial to him and afterwards prosecute a writ of error to reverse the part which is unfavorable to him." *Boylan* v. *Boylan,* 349 Ill. 471, 473; *Scott* v. *Scott,* 304 Ill. 267, 272; *People* v. *Lee,* 286 Ill. App. 1; *Holt* v. *Rees,* 46 Ill. 181, 183. The position assumed by petitioner is directly contrary to the decisions of the Supreme Court of Illinois commencing a century ago with *Morgan* v. *Ladd* (1845) 7 Ill. (2 Gilm) 415, where the court declined to permit the appellant to bring into court the money which he received in satisfaction of the judgment which he later sought to reverse upon a writ of error.

The injustice and confusion incident to the theory asserted by petitioner become apparent when we consider that he, as a resident of New Jersey, could not go into his own State Courts and advance such an argument. The New Jersey courts hold: "The rule is that when a litigant accepts the benefit awarded him by a judgment or decree he is precluded from afterward challenging the validity of the conditions by an appeal". *In re Fidelity Union Title & Mortgage Guaranty Co.,* 137 N. J. Eq. 193; *Kraus* v. *Kraus,* 74 N. J. Eq. 417.

The mischievous results of a so-called federal general rule at variance with State decisions were recognized and corrected by this Court in *Erie* v. *Tompkins,* 304 U. S. 64. In that decision this Court closed the chasm which prevented uniformity of law between federal and state courts. It would serve no purpose to create a new monster to take the place of the old which this Court laid to rest.

The *lex loci* should be "the governing rule of private right under whatever jurisdiction private right comes to be examined." *Hawkins* v. *Barney Lessee,* 5 Pet. 457, 464.

The Court of Appeals applied the law of Illinois in this case which, we submit, is in harmony with the decisions of this Court and the repeated holdings of other federal Courts of Appeal.

III.

There Is No Inconsistency Between the Decision of the Court of Appeals in This Case and Rule 62(d) and 28 U. S. C. 1961.

Petitioner's argument under this point is ridiculous and frivolous. If the contract was in full force and effect then plaintiff was not entitled to the judgment awarding him the balance of the funds and the pilot plant. As applied to the present case, the petitioner cannot assert that the contract between him and respondents is still in force and effect and at the same time have and enjoy benefits which only flow from a termination of the contract.

Whether the petitioner agreed or disagreed with the judgment of the District Court finding the contract at an end, there was no occasion for any party to invoke Rule 62(d) for a stay of execution. If petitioner disagreed with that part of the judgment which awarded money to him there was no reason for him to collect the fruits which only inured to him upon termination of the contract. If he agreed, as his conduct indicated, a stay of execution would nevertheless be available to the respondents under Rule 62(d), or they could pay the judgment, as was done in this case. Had the petitioner refused the payment, respondents could have deposited the money with the Clerk of the Court.

Nor does the holding of the Court of Appeals have any effect upon 28 U. S. C. 1961 allowing interest on judgments. This point is moot because petitioner has collected his judgment and is not entitled to interest. Moreover, it is the settled rule that a party who appeals from a judgment in his favor is not entitled to interest on the judgment. The party who appeals puts it out of the power of the opposite party to pay the judgment. Under such circumstances there would be no enforceable judgment until the appeal was disposed of in a court of review. Interest in such cases is never allowed during the pendency of an appeal. *The Charm*, 59 Fed. 476; *Bates* v. *Dresser*, 251 U. S. 524, 532; *McGowan* v. *London and Lancashire Indemnity Company of America*, 237 Ill. App. 561, 569, 570.

Conclusion.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX.

Representative State Decisions Illustrating the Rule Applied by the Court of Appeals in This Case.

Shannon Copper Co. v. *Potter,* 14 Ariz. 481, 131 P. 157, 158.

Wolford v. *Warfield,* 170 Ark. 82, 278 S. W. 639.

Giometti v. *Etienne,* 5 Calif. 2d 411, 55 P. 2d 216.

McMullen v. *Fort Pierce Financing & Construction Co.,* 108 Fla. 492, 146 So. 567.

Grizzel v. *Grizzel,* 190 Ga. 219, 9 S. E. 2d 247.

Boylan v. *Boylan,* 349 Ill. 471, 473, 182 N. E. 614.

Holt v. *Rees,* 46 Ill. 181, 183.

McGowan v. *London and Lancashire Indemnity Company of America,* 237 Ill. App. 561, 569, 570.

Morgan v. *Ladd,* (1845) 7 Ill. (2 Gilm) 415.

Peoples v. *Lee,* 286 Ill. App. 1, 3 N. E. 2d 389.

Scott v. *Scott,* 304 Ill. 267, 272, 136 N. E. 659.

McCraken v. *Cabel,* 120 Ind. 266, 22 N. E. 136.

Kelly, Shuttleworth & McManus v. *Central Nat'l. Bk. & Tr. Co.,* 217 Iowa 725, 248 N. W. 9, 16.

Ralston v. *Ralston,* 125 Kan. 619, 264 P. 146, 147.

Graves v. *Allen,* 208 Ky. 764, 271 S. W. 1077.

Silverberg v. *Silverberg,* 148 Md. 682, 130 A. 325, 327.

Mastin v. *May,* 130 Minn. 281, 153 N. W. 756.

In re Block's Estate, 32 Mont. 51, 79 Pac. 554.

Winsor v. *Schaeffer,* 224 Mo. App. 1220, 34 S. W. 2d 989, 990.

Hoesly v. *Dept. of Roads & Irrigation,* 142 Neb. 383, 6 N. W. 2d 365.

In re Fidelity Union Title & Mortgage Guaranty Co., 137 N. J. Eq. 193, 44 A 2d 205, 208.

Evarts v. *Stovall,* 42 N. M. 32, 75 P. 2d 154.

Metropolitan Trust Co. v. *Long Acre Electric Co.,* 223 N. Y. 69, 119 N. E. 233, 234.

McCarty v. *Lumry,* 173 Okla. 472, 49 P. 2d 188.

Richmond v. *White,* 98 Oregon 310, 193 P. 1026, 1029.

Ullery v. *Clark,* 18 Pa. 148.

Texas Employers' Ins. Ass'n. v. *King,* 52 S. W. 2d 668 (Ct. of Civil Appeals of Texas).

Cornia v. *Cornia,* 80 Utah 486, 15 P. 2d 631, 632.

Chesapeake & Ohio Ry. Co. v. *Lane,* 113 W. Va. 51, 166 S. E. 698, 699.

Hanson v. *Chicago & L. S. Ry. Co.,* 167 Wis. 335, 167 N. W. 450.